STATE OF MICHIGAN

COURT OF APPEALS

HEATHER VEREMIS and TAD VEREMIS, Plaintiffs-Appellees,	UNPUBLISHED June 4, 2013
v	No. 302658 Saginaw Circuit Court
GRATIOT PLACE, L.L.C., Defendant-Appellant.	LC No. 07-063269-NI

Before: M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

MURRAY, J. (*concurring in part, dissenting in part*).

I concur in the majority's decision to reverse the trial court's order denying defendant's motion for directed verdict on plaintiffs' premises liability claim, but dissent from its affirmance of the order denying a directed verdict on the nuisance claims.

I. PUBLIC NUISANCE

In looking at the evidence in the light most favorable to plaintiff,[1] I would conclude that the trial court erred in denying defendant's motion for a directed verdict on the public nuisance claim. "[U]nder a nuisance theory, liability is based on a dangerous, offensive, or hazardous condition of the land or on activities of similar characteristics which are conducted on the land." *Wagner v Regency Inn Corp*, 186 Mich App 158, 163; 463 NW2d 450 (1990). For a defendant to be held liable for a nuisance, he must possess or control the land. *Id*.

> A public nuisance is an unreasonable interference with a common right enjoyed by the general public. The term "unreasonable interference" includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights. A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public. [*Cloverleaf Car Co v*

[1] The singular "plaintiff" refers to Heather Veremis, the plaintiff injured in the automobile accident.

Phillips Petroleum Co, 213 Mich App 186, 190; 540 NW2d 297 (1995) (citations omitted).]

A public nuisance includes "activity . . . [that is] harmful to the public health, or create[s] an interference in the use of a way of travel, or affect[s] public morals, or prevent[s] the public from the peaceful use of their land and the public streets[.]" *Garfield Twp v Young*, 348 Mich 337, 342; 82 NW2d 876 (1957) (citations omitted).[2] This case does not raise a typical public nuisance claim, such as when there is an actual obstruction of a public highway that precludes the public's use of the roadway. See, e.g., *Long v New York Central R Co*, 248 Mich 437, 439; 227 NW 739 (1929) and *Neal v Gilmore*, 141 Mich 519, 522; 104 NW 609 (1905). Indeed, the alleged public nuisance is a not a condition that impedes traffic or otherwise prevents the public's use of the parking lot or public easement. Rather, plaintiff alleges that it is the potential danger of the blind spot that creates a public nuisance. This raises the question whether the blind spot constitutes an unreasonable interference with a common right enjoyed by the general public. *Cloverleaf Car Co*, 213 Mich App at 190.

The 2 Restatement of Torts 2d, § 821B, p 92, contains a good discussion of what constitutes interference with a public right:

> Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. *It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured*. Thus the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution *prevents* the use of a public bathing beach or kills the fish in a navigable stream and so deprives *all members of the community* of the right to fish, it becomes a public nuisance. [Emphasis added.]

As the Supreme Court has stated, "[t]o be considered public, the nuisance must affect an interest common to the general public, rather than peculiar to one individual, or several . . . ." *Garfield Twp*, 348 Mich at 342, quoting Prosser, Torts, § 71, pp 401-402.

There was no material factual question regarding whether the mailboxes and newspaper stand constituted a public nuisance. The evidence presented by plaintiff at best established that a few minor accidents and "close calls" occurred at the intersection. Thus, the nuisance did not affect the general public, but rather only a few individuals. There was also no evidence that the general public was always endangered every time-or even most of the time-vehicles drove in this

[2] We have previously cautioned that it would "be a mistake to read this description of public nuisance too broadly[,]" for not just "any interference with public safety is sufficient to establish a public nuisance." *Askwith v City of Sault Ste Marie*, 191 Mich App 1, 6; 477 NW2d 448 (1991).

area. Indeed, the only time an accident would occur at this location was when one of the drivers entering the intersection was not paying attention, a fact admitted to by plaintiff. Additionally, to the extent the blind spot limited the view of the intersection when travelling westbound or southbound towards the intersection, needing to yield when approaching an intersection in a parking lot does not significantly interfere with the public's safety. See *Rand v Knapp Shoe Stores*, 178 Mich App 735, 742; 444 NW2d 156 (1989) (holding that a blind spot existing at a corner in a strip mall did not constitute an attractive nuisance because the blind spot between the alley and sidewalk created by the building was a typical design and not inherently dangerous, and to hold otherwise would require "property owners to post warnings at almost every building corner."). After all, even when on private property a driver must always exercise ordinary and reasonable care in the operation of a motor vehicle. *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956).

Consequently, the mailboxes and newspaper stand at the corner of the intersection were not a dangerous condition of the land that created an unreasonable interference with a common right enjoyed by the general public.[3] The trial court should have granted defendant's motion for directed verdict on plaintiff's public nuisance claim.

II. NEGLIGENT NUISANCE IN FACT

Again, reviewing the evidence in the light most favorable to plaintiff, I would hold that the trial court erred in denying defendant's motion for a directed verdict on the negligent nuisance in fact claim. As previously indicated, a nuisance is "a dangerous, offensive, or hazardous condition of the land" or "activities of similar characteristics which are conducted on the land." *Wagner*, 186 Mich App at 163. "[A] nuisance in fact is a nuisance by reason of circumstances and surroundings. An act may be found to be a nuisance in fact when its natural tendency is to create danger and inflict injury on person or property." *Id*. at 164. "A negligent nuisance in fact is one that is created by the landowner's negligent acts, that is, a violation of some duty owed to the plaintiff which results in a nuisance." *Id*.

There was no factual question regarding whether the mailboxes and newspaper stand constituted a negligent nuisance in fact. As the majority correctly held, defendant did not owe a duty to warn plaintiff as a licensee on the premises because the condition was not a hidden danger on the land. Because defendant did not violate a duty owed to plaintiff that resulted in a

[3] *Li v Feldt (On Second Remand)*, 187 Mich App 475; 468 NW2d 268 (1991) rev'd 439 Mich 457 (1992), relied upon by plaintiff, is not persuasive. For one, it was reversed on appeal. *Li v Feldt (After Second Remand)*, 439 Mich 457; 487 NW2d 127 (1992). Additionally, the facts at issue in that case—a traffic light placed by the city at an intersection that was improperly timed—is much more of an unreasonable interference with the rights enjoyed by the general public than a blind spot in a parking lot. A traffic light is deployed for safety purposes, and one that is improperly timed such that two cars simultaneously enter the intersection with the drivers believing they each have the right of way is unquestionably more dangerous in kind than a limited blind spot at an obvious intersection in a parking lot.

nuisance, the claim for negligent nuisance in fact should have been dismissed.[4] *Wagner*, 186 Mich App at 163-164. The trial court should have granted defendant's motion for directed verdict on the nuisance in fact claim.

Because I would hold that the trial court should have granted defendant's motion for directed verdict on all of plaintiffs' claims, I would not consider defendant's remaining issues on appeal.

/s/ Christopher M. Murray

[4] On a separate issue, while plaintiff asserts that defendant had a duty to provide unobstructed passage through the premises pursuant to the access easement, plaintiff fails to explain how the mailboxes and newspaper stand at the northeast corner of the intersection obstructed passage through the easement. There was no evidence suggesting that the mailboxes and newspaper stand actually impeded traffic from proceeding through the easement, and thus, there was no evidence that defendant violated a duty.